

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 12, 2014

v

KENNETH TWYMAN BLUEW,

Defendant-Appellant.

No. 313397
Saginaw Circuit Court
LC No. 11-036568-FC

Before: SAAD, P.J., and OWENS and K.F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), assault of a pregnant individual with intent to cause miscarriage or stillbirth, MCL 750.90a, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to life imprisonment without the possibility of parole for the murder conviction, 65 to 100 years' imprisonment for the assault conviction, and two years' imprisonment for each of the felony-firearm convictions. We affirm defendant's convictions, but remand for articulation of the justification for the sentencing departure for the assault conviction or resentencing.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that defense counsel was ineffective for failing to consult with and call an expert witness in pressure point control tactics (PPCT), such as John Leonard, as well as an expert in forensic pathology, such as Dr. Carl Schmidt. According to defendant, testimony from such experts would have contradicted the opinion of Dr. Kanu Virani that the victim died from the application of a lateral vascular neck restraint rather than by hanging. Because no *Ginther*¹ hearing was held on defendant's claim of ineffective assistance of counsel, our review is limited to errors apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

To establish a claim for ineffective assistance of counsel, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To show that counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's conduct constituted reasonable trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). "An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *Id.* (quotation marks and citation omitted). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (quotation marks and citation omitted).

We first note that defense counsel is not required to continue seeking experts until he finds one who will offer favorable testimony, see *People v Eliason*, 300 Mich App 293, 300; 833 NW2d 357 (2013), and although defense counsel chose not to call them, he did consult with two experts, one in forensic pathology. Further, although the affidavits of Leonard and Schmidt may raise a question as to whether the victim died from hanging as opposed to a chokehold, they do not raise any reasonable question as to whether defendant killed the victim in light of the overwhelming evidence of guilt presented at trial. Specifically, there was extensive evidence of defendant's DNA and fingerprints on the victim's clothing and vehicle. Evidence such as defendant's DNA found underneath the victim's fingernails and in numerous bloodstains in the victim's vehicle, would not have been found if defendant was simply present at the scene to investigate the crime as part of his duties as a police officer. The evidence of phone calls between defendant and the victim shortly before she died, defendant's demeanor at the crime scene, and his injuries, further incriminate him. In the end, the means by which the victim died is immaterial where there is overwhelming evidence that defendant killed the victim by means of a violent assault. Accordingly, we conclude that defense counsel was not ineffective for failing to call an expert witness in PPCT and forensic pathology, particularly where they would not have deprived defendant of a substantial defense as to make a difference in the outcome of the trial.

II. CONSTITUTIONALITY OF MCR 2.511(D)(10)

Defendant next argues that MCR 2.511(D)(10), which allows a prospective juror that has been the subject of a criminal prosecution to be challenged for cause, is unconstitutional. We review questions of constitutional law de novo, and "we interpret court rules using the 'same principles that govern the interpretation of statutes.'" *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012), quoting *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011). A rule of statutory construction is that statutes are presumed constitutional, and the party challenging the statute has the burden of proving that it is unconstitutional. *People v Malone*, 287 Mich App 648, 658; 792 NW2d 7 (2010). Thus, the same would apply to court rules.

Defendant claims that MCR 2.511(D)(10) violates his Sixth Amendment right to an impartial jury because its effect is a systematic exclusion of African-Americans from juries. The same argument was raised and rejected by this Court in *People v Eccles*, 260 Mich App 379,

384-386; 677 NW2d 76 (2004). At the end of its analysis, the Court stated that, while the case did not present a good record on which to consider the argument, it “might have merit in a different case.” *Id.* at 386 n 6. The present case, however, is not one where the argument has merit. As in *Eccles*, here, the record is devoid of any evidence that the prospective jurors excused under MCR 2.511(D)(10) were in fact African-American. Consequently, there is no evidence to conclude that the application of MCR 2.511(D)(10) resulted in the exclusion of any African-Americans from the jury.²

Defendant relies on case law, including *Duren v Missouri*, 439 US 357; 99 S Ct 664; 58 L Ed 2d 579 (1979), that concerns systematic exclusion of minorities into the jury array, without offering any argument as to why the case law should be applicable to the selection of the jury panel. As in *Eccles*, even if we assume that the law pertaining to the selection of the jury array is equally applicable to the selection of the jury panel, there is no evidence to conclude that the application of MCR 2.511(D)(10) resulted in such an exclusion here. See *Eccles*, 260 Mich App at 384 n 3. Further, defendant offers no argument why the exclusion of a prospective juror under MCR 2.511(D)(10) should be considered a systematic exclusion, which is one that is not fair and reasonable, when that juror is excused because of a presumed bias. In other words, “that a prospective juror has been the subject of a criminal prosecution raises a question concerning that person’s ‘capacity to render a fair and impartial verdict’ in a criminal matter.” *Eccles*, 260 Mich App at 383 (citation omitted). Accordingly, defendant has failed to show that application of MCR 2.511(D)(10) result in the systematic exclusion of African-Americans in violation of the Sixth Amendment.

Defendant also claims that MCR 2.511(D)(10) is overbroad because it makes no distinction between prospective jurors who were acquitted and those who were convicted after having been accused by the prosecutor. Because defendant fails to support his argument with any citation to legal authority, the argument is abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) (“An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.”). Nevertheless, we conclude that defendant’s argument is without merit because the court rule does not “chill” any constitutionally protected behavior. See *People v Roberts*, 292 Mich App 492, 500; 808 NW2d 290 (2011).

Finally, defendant claims that MCR 2.511(D)(10) is fundamentally unfair because it gives the prosecutor an unfair advantage. He explains that while a prospective juror who was accused in a criminal prosecution can be excused for cause without being questioned for bias, there is no counterpart for police officers. There is, however, a difference between prospective

² To support his argument, defendant relies on census data detailing the Caucasian and African-American populations in the state of Michigan and Saginaw County, as well as statistics regarding the Michigan prison population and the 2011 arrest totals. However, because this data was not presented to the trial court, it is not part of the record on appeal and is therefore not properly before this Court. *Eccles*, 260 Mich App at 384 n 4, citing MCR 7.210(A)(1); *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000).

jurors who are police officers and those who were accused in a criminal prosecution. Regarding the latter, at some previous time, the prospective jurors were charged by the prosecution with having committed a crime. In the criminal proceedings that followed, the prosecution and the prospective jurors were adverse parties. But, in regard to prospective jurors who are police officers, they and the defendant have not always been adverse parties in legal proceedings. Based on this difference, it is not fundamentally unfair that while prospective jurors who were accused by the prosecution can be challenged for cause without any inquiry into whether they are biased, prospective jurors who are police officers cannot be challenged for cause simply because of their occupation. We note that prospective jurors who are police officers can still be challenged for cause on the basis of bias. A police officer can be challenged if he or she “is biased for or against a party or attorney,” MCR 2.511(D)(2), “shows a state of mind that will prevent the person from rendering a just verdict,” MCR 2.511(D)(3), or “has opinions or conscientious scruples that would improperly influence the person’s verdict,” MCR 2.511(D)(4).

III. CHALLENGES FOR CAUSE

Defendant next argues that the trial court erred when it denied six of his challenges for cause. We review a trial court’s decision on a challenge for cause for an abuse of discretion. *Williams*, 241 Mich App at 521. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Unger (On Remand)*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

First, defendant argues that the trial court erred in denying his challenges for cause to five jurors—N, S, A, T, and D³—under MCR 2.511(D)(2), (3), (4), because each had formed an opinion on his guilt. We use a four-part test to determine whether a trial court’s error in denying a challenge for cause requires reversal:

There must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable. [*People v Lee*, 212 Mich App 228, 248-249; 537 NW2d 233 (1995).]

The presumption that jurors are impartial, *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987), is not rebutted by the mere existence of knowledge of the facts and issues involved in the case or a preconceived notion of the defendant’s guilt, *Irvin v Dowd*, 366 US 717, 722-723; 81 S Ct 1639; 6 L Ed 2d 751 (1961). “It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.” *Id.* at 723.

The trial court did not abuse its discretion in denying defendant’s challenges for cause to excuse Jurors N, S, A, T, and D. Although the five prospective jurors had a preconceived notion of defendant’s guilt, each of them unequivocally indicated in some fashion that they could set

³ The jurors’ first initials are used to protect their privacy due to some identical last initials.

aside their opinion and render a verdict based on the evidence presented at trial. Specifically, Jurors S and T expressly assured the trial court that they could set aside their opinion and render a fair and impartial verdict based on the evidence. Although the other three jurors did not make this express assurance, each gave assurances that they would not decide the case based on their opinion. Juror N stated that she would absolutely try to keep an open mind about the evidence. She thought she could be fair and impartial to both sides. Indeed, because she could not remember many of the details, it would not be hard for her to set aside her opinion. Juror D thought she could keep an open mind about the evidence, and she believed that she could be fair and impartial. Juror A knew that she had not heard all the evidence, and she would keep an open mind about the evidence and follow the presumption that defendant was innocent. Because we defer to the trial court's superior ability to assess from the prospective jurors' demeanor whether they would be impartial, *Williams*, 241 Mich App at 522, we conclude that the trial court's denials of defendant's challenges for cause to these five prospective jurors did not fall outside the range of reasonable and principled outcomes.

Second, defendant argues that the trial court erred in denying his challenge to Juror R because he disagreed with the presumption of innocence. Although Juror R initially stated that he believed defendant needed to prove his innocence, when questioned further by the prosecutor and the trial court, he stated that he understood and accepted that defendant was presumed innocent. The statements by Juror R in response to the additional questioning were made without any qualification or apparent reluctance. This fact distinguishes the present case from *Franklin v Anderson*, 434 F3d 412, 426-428 (CA 6, 2006), a case relied on by defendant, where the Sixth Circuit held that the trial court erred when it failed to remove a prospective juror when the juror showed a continuing inability to understand the burden of proof even after being instructed on it by the trial court. Again, giving deference to the trial court's superior ability to assess Juror R's demeanor, we conclude that the trial court's decision not to excuse Juror R for cause fell within the range of reasonable and principled outcomes.

IV. PEREMPTORY CHALLENGES

Defendant next argues that the trial court erred in denying his request for additional peremptory challenges. According to defendant, additional peremptory challenges were justified because of the amount of pretrial publicity and because the prosecutor engaged in improper questioning of four prospective jurors. Because defendant's request to the trial court for additional peremptory challenges was only based on pretrial publicity, this claim of error is preserved as it concerns publicity, but is unpreserved as it concerns improper questioning. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007); *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). We review a trial court's decision on a request for additional peremptory challenges for an abuse of discretion. *People v Howard*, 226 Mich App 528, 536; 575 NW2d 16 (1997). We review unpreserved claims of error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Upon a showing of good cause, a trial court may grant a party additional peremptory challenges. MCR 6.412(E)(2); *Howard*, 226 Mich App at 536. In *People v King*, 215 Mich App 301, 303-304; 544 NW2d 765 (1996), this Court held that the amount of pretrial publicity was not good cause for additional peremptory challenges because all of the seated jurors who were

aware of the case indicated under oath that they could render a fair and impartial verdict based on the evidence presented at trial. In this case, jury selection took four days. During the first three days, the prospective jurors who had any knowledge of the case, and who had not been excused for cause for another reason, were individually questioned regarding whether they had an opinion on defendant's guilt. Those who could not set aside their opinion were excused. Because the trial court excused the prospective jurors who could not set aside their opinion on defendant's guilt, the trial court's decision to deny defendant's request for additional peremptory challenges based on pretrial publicity fell within the range of reasonable and principled outcomes. See *id.*

Further, we reject defendant's argument that the trial court committed plain error when it failed to give additional peremptory challenges based on improper questions asked by the prosecutor while four prospective jurors were being individually questioned. Defendant does not explain how the challenged questions were actually improper. Even assuming that the questions were improper, defendant makes no argument that the prosecutor's questioning tainted the jurors by injecting partiality, limited his ability to question the jurors about their exposure to the pretrial publicity, or prevented the trial court from being able to make its own assessment of the jurors' bias. See *People v Tyburski*, 445 Mich 606, 623-624; 518 NW2d 441 (1994) (opinion by MALLETT, J.) (noting that these are the concerns that can arise by allowing attorneys to voir dire prospective jurors where pretrial publicity creates the danger of unfair prejudice). In the absence of any such arguments, defendant has not established that the trial court's failure to grant additional peremptory challenges based on improper questioning was plain error.

V. MOTION FOR CHANGE OF VENUE

Defendant next argues that the trial court, at the conclusion of jury selection, erred in denying his motion for change of venue. We review a trial court's decision on a motion for change of venue for an abuse of discretion. *People v Jendrzewski*, 455 Mich 495, 500; 566 NW2d 530 (1997).

A criminal defendant must generally be tried in the county where the crime was committed. *Id.* at 499. However, in special circumstances where justice demands, a trial court may change venue to another county. *Id.* at 500. Two approaches may be used to determine whether justice demands a change of venue. *Id.* at 500-501. First, "[c]ommunity prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted." *Id.* at 500-501. Second, "community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice." *Id.* at 501.

For the first approach, defendant did not present to the trial court any documentary evidence to support his assertion of extensive media coverage. Consequently, we do not know the extent to which the case was reported in the media or the content of the media reports to determine whether the publicity was extensive and highly inflammatory as to incite community prejudice. Although most prospective jurors indicated having some knowledge of the case, where the record contains no evidence regarding how often the case was reported in the media and whether the reports were factual or inflammatory, we cannot conclude that the pretrial publicity was so unrelenting and prejudicial that it amounted to actual prejudice against

defendant such that the trial court abused its discretion in denying the motion for change of venue. See *id.* at 500-501.

For the second approach, based on our review of the record, 93 prospective jurors were asked whether they had any knowledge about the case. Only 13 replied that they knew nothing about it. Seventy-eight of the prospective jurors, which included two of the jurors who had indicated they had no knowledge of the case, were individually questioned regarding whether they had an opinion on defendant's guilt. The trial court excused 23 of them because they admitted that they could not set aside their opinions. In addition, one of the prospective jurors who initially had no knowledge about the case was excused after his father told him about it and he formed an opinion on defendant's guilt that he could not set aside. Thus, out of the 11 prospective jurors who had not heard about defendant's case and were not individually questioned and the 78 jurors who were questioned about their knowledge of the case, 24 of them were excused for cause after they admitted to a disqualifying bias.⁴ The percentage of jurors excused was less than the percentage that this Court in *People v DeLisle*, 202 Mich App 658, 667-669; 509 NW2d 885 (1993), held was insufficient to presume that the seated jurors were biased, and was only minimally higher than the percentage that the United States Supreme Court stated "by no means suggests a community with sentiment so poisoned against [the defendant]." *Murphy v Florida*, 421 US 794, 803; 95 S Ct 2031; 44 L Ed 2d 589 (1975). Under these circumstances, we cannot conclude that the trial court abused its discretion in denying defendant's motion for change of venue on the basis that the pretrial publicity led to a deeply hostile community against defendant so "as to impeach the indifference of jurors who displayed no animus of their own." *Id.*

VI. PROSECUTORIAL MISCONDUCT

Defendant next claims that the prosecutor committed misconduct when he failed to correct Dr. Virani's testimony about the number of autopsies he had conducted in Michigan. We review this unpreserved claim of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Dr. Virani testified that he has performed 115,000 to 116,000 autopsies over the past 21 years in Michigan. This testimony was clearly incorrect, given that Dr. Virani also testified that he performs between 500 and 700 autopsies per year. Simple math would reveal that 700 autopsies for 21 years is 14,700. However, the conduct of the prosecutor in eliciting the testimony or in failing to correct it does not constitute misconduct amounting to plain error. Nothing in the record indicates that the prosecutor perceived that Dr. Virani gave an inflated answer to the question of how many autopsies he had performed in Michigan or that the prosecutor subsequently became aware that Dr. Virani's answer was incorrect. See *People v Canter*, 197 Mich App 550, 558-559; 496 NW2d 336 (1992) (stating that the prosecutor's elicitation of perjured testimony did not entitle defendant to a new trial when there was no evidence that the prosecutor knew the testimony was false); see also *People v Aceval*, 282 Mich

⁴ Four jurors who indicated that they had knowledge of the case were excused for other reasons before they could be individually questioned.

App 379, 389; 764 NW2d 285 (2009) (stating that a prosecutor may not *knowingly* use false testimony to obtain a conviction). Further, defendant has failed to establish the testimony affected his substantial rights where it cannot be disputed that Dr. Virani's experience still made him qualified to testify as an expert in forensic pathology, see MRE 702, and as discussed *supra*, there was overwhelming evidence of defendant's guilt.

VII. SENTENCING GUIDELINES DEPARTURE

Finally, defendant argues that he is entitled to be resentenced on his conviction for assault of a pregnant individual because the trial court failed to articulate a substantial and compelling reason for departing from the appropriate sentencing guidelines range. We review for clear error whether a particular factor supporting departure exists. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). We review de novo "[a] trial court's determination that a factor is objective and verifiable," and review for an abuse of discretion the court's determination that the factors constitute substantial and compelling reasons to depart from the sentencing guidelines range. *People v Anderson*, 298 Mich App 178, 183; 825 NW2d 678 (2012); *People v Hardy*, 494 Mich 430, 438 n 17; 835 NW2d 340 (2013). A trial court's factual determinations must be supported by a preponderance of the evidence. *Hardy*, 494 Mich at 438.

A trial court may depart from the appropriate sentencing guidelines if it "has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). To be substantial and compelling, the reason must be objective and verifiable and "of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). "The court shall not base a departure on an offense or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3). Substantial and compelling reasons only exist in exceptional cases; thus, is imperative that the trial court "justify *on the record* both the departure and the extent of the departure." *Id.* at 299, 313.

The reason that the trial court gave for the departure was that defendant, by premeditating the victim's death, "by necessity" also "plotted and planned" the murder of her unborn child, and the guidelines did not account for what the trial court believed amounted to first-degree premeditated murder of the unborn child. This Court has previously held that planning and deliberation can constitute a substantial and compelling reason, *Anderson*, 298 Mich App at 185-186, and we find no reason to conclude otherwise here. Defendant's "plotting and planning" of the murder of the unborn child was not reflected in the guidelines, and is also a fact that does not exist in all cases involving assault of a pregnant individual with intent to cause miscarriage or stillbirth. See *Smith*, 482 Mich at 301. While the offense and guidelines certainly account for the intent to kill and the resulting death, see MCL 750.90a and MCL 777.33(1)(a), (2)(b), they do not consider the planning and deliberation that occurred beforehand. This fact is objective and verifiable, and of considerable worth in determining defendant's minimum sentence.

However, we conclude that the trial court's reason did not justify the particular departure made, which was 45 years more than the top of the guidelines range. Although we could

speculate that the trial court's sentence of 65 to 100 years' imprisonment was meant to reflect a life sentence for the first-degree premeditated murder of the unborn child, where it is not clear why the trial court made a particular departure, we cannot substitute our judgment about why the departure was justified. *Smith*, 482 Mich at 304. In examining the applicable sentencing grid, the sentence defendant received would fall only within the appropriate guidelines range of someone who committed a similar crime but had a much higher PRV score. See MCL 777.62. Proportionality is to be judged by weighing the nature of the offense and the offender's criminal history. *Smith*, 482 Mich at 309. Our Supreme Court has suggested that where, as here, the defendant had no criminal history, a minimum sentence that is 15 years more than the top of the guidelines may be disproportionate. *Id.* Because we cannot clearly determine why the trial court selected a minimum sentence that greatly exceeded the appropriate guidelines range, we must vacate defendant's sentence for the assault of a pregnant individual with intent to cause miscarriage or stillbirth and remand the case to the trial court to explain why the sentence of 65 to 100 years' imprisonment is more proportionate to the offense and the offender than a sentence within the appropriate guidelines would have been or to resentence defendant. *Smith*, 482 Mich at 310-311.

Affirmed as to convictions, but remanded for articulation or resentencing.

/s/ Henry William Saad

/s/ Donald S. Owens

/s/ Kirsten Frank Kelly